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IN THE

Supreme Court of the United States

October Term, 1968.

No. 760

JOSEPH JOHN HESSION
and
SOPHIE HESSION, His Wife,
Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

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OPINIONS BELOW.

The Report of the Board of View (R. 46a-48a),[1] the Order of the Court of Common Pleas of Philadelphia County (R. 50a) and the Opinion of that Court (App. *infra*, pp. 13b-20b) are unreported. The Opinion of the Supreme Court of Pennsylvania (App. *infra*, pp. 1b-12b) is reported at 430 Pa. 273 and 242 A. 2d 432.

JURISDICTION.

The decision of the Supreme Court of Pennsylvania was rendered on May 21, 1968 and a timely petition for reargument was denied on June 26, 1968. On September 10, 1968, Mr. Justice Brennan ordered that petitioners' time for filing a petition for writ of certiorari be extended to and including November 23, 1968.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(3).

QUESTION PRESENTED.

Where the Commonwealth of Pennsylvania, in the exercise of the power of eminent domain, destroys petitioners' direct access to a through-highway by substantially vacating and abandoning that portion of the highway on which petitioners' home and business establishment are located and shifting the location of the highway to a point where petitioners' property is not even visible from it, thereby causing a severe depreciation in the value of petitioners' property, has there been a "taking" of property so as to require the Commonwealth of Pennsylvania to pay "just compensation" to petitioners?

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1. Record references herein are to the printed Record in the court below, included as part of the record certified by the Court of Common Pleas of Philadelphia County.

CONSTITUTIONAL PROVISIONS INVOLVED.

1. The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> "* * * nor shall private property be taken for public use, without just compensation."

2. The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law * * *."

STATEMENT.

This case raises a question whether government, in highway construction and road relocation programs, may destroy an abutting property owner's right of direct access and impair the value of his property without paying just compensation.

Since 1949 petitioners have owned improved real property located on State Road at the northwest corner of the intersection of that road and Longshore Street in the City of Philadelphia. The building has served for many years as a combination residence, restaurant and tavern, petitioners having expended substantial sums over the years in improving the building for the business purposes (R. 2a-3a, App. p. 1b).[2]

The business conducted at the site by petitioners catered to a limited extent to the residents of the area, but the major portion of petitioners' business came from truck drivers and other motorists traveling along State Road. State Road was, and is, a heavily-traveled through

2. The building is shown on the photograph marked "1" in the appendix. The street on which the truck appears is State Road (formerly a north-south thoroughfare) and the street on which the automobile appears is Longshore.

highway. So long as State Road traffic passed by petitioners' door, the business was profitable and offered an excellent return on the capital invested and the time and labor devoted to it (R. 3a).

In 1961, as part of its construction of the Delaware River Expressway (Interstate Highway 95), the Commonwealth of Pennsylvania vacated what was "State Road" south of Longshore, thereby converting the intersection with Longshore from a full cross-intersection to a "T" intersection (App. p. 2b).[3]

In addition, at a location approximately one-quarter mile north of Longshore Street, State Road was relocated; it was widened and caused to curve around to the east and to pass under the elevated Delaware River Expressway (R. 5a).[4]

As now relocated, State Road crosses Longshore Street about 300 feet east of its former location (R. 5a, App. p. 1). The one-quarter mile strip of the former State Road between the swingover and Longshore Street has been abandoned; through traffic on that street has been completely curtailed (R. 5a). Moreover, the State, by this taking, not only physically removed petitioners' establishment from State Road, but also prevented it from being seen from the relocated State Road since the swingover occurs at a point too far removed from Longshore for a motorist to see and recognize petitioners' establishment from that point.[5] Also, the west wall of the elevated Delaware River Expressway is so situated as to block the view

3. This is clearly depicted on photograph "1".

4. This relocation is shown on the second annexed photograph (marked "2" in the appendix), the new State Road traveling to the left and the former State Road going straight ahead.

The overpass shown in the distance on photograph "2" is where the Delaware River Expressway crosses Longshore Street.

5. This is shown on photograph "2".

of petitioners' establishment from all other locations along State Road.[6]

The effect of the relocating of State Road, the vacating of the former State Road south of Longshore, the abandonment of the one-quarter mile strip of State Road north of Longshore and the destruction of direct access between petitioners' property and State Road, has been severely to diminish the value of petitioners' property and to devastate petitioners' business. The lifeblood of petitioners' business—the transient traffic—has been taken away, and what was formerly a thriving business has been destroyed.

On December 21, 1965 (R. 1a), pursuant to Pennsylvania practice, petitioners requested the Court of Common Pleas of Philadelphia County to appoint viewers to assess the damages sustained by petitioners as a result of the foregoing and to award them damages (R. 2a-3a).

A Board of View was thereupon appointed and on June 9, 1966, a hearing was held by the Board (R. 7a-46a). It was made clear at the hearing that petitioners were claiming rights not only under the Pennsylvania Eminent Domain Code, but also under the Constitutions of Pennsylvania and the United States (R. 15a).

At the hearing, two real estate experts testified. One calculated the damages to petitioners' property at $43,000 (R. 36a),[7] and the other set damages at $25,000 (R. 25a).[8] As stated by the witnesses, the elements of damage were:

> "The fact that the property has been removed from a major through street to a less satisfactory location, that it does not have the same highest and best use after the damage as it did prior to the damage. It

6. This is shown on photographs "1" and "2".

7. This witness testified that the property was worth $60,000 before the changes and $17,000 afterwards.

8. This witness testified that the "before" value was $45,900 and the "after" value $20,900.

has lost all advertising value that a commercial location requires. It is inconspicuously located. * * * The highest and best use has now been changed from retail commercial to industrial. I believe that the location is marketable as an industrial site, but its value for industrial purposes is substantially less than its former value for commercial use. Aiso, the value of the improvements is severely penalized as the main structure would be of little use to most industrial installations." (R. 26a-27a).

"The elements of damage which I considered were the dead ending of State Road, the very substantial reduction in traffic going past the front of this property, the elevation of the Expressway opposite the front of the property, the major result of that change, in my opinion, is that a change of the highest and best use of the property from a retail-commercial type of location to an industrial one" (R. 31a-32a).

Following conclusion of the hearing, and after inspecting the premises, the Board of View filed a Report awarding petitioners $20,000 as compensation for the damages sustained by them (R. 48a).

The Commonwealth of Pennsylvania appealed to the Court of Common Pleas, arguing that no compensable damages had been sustained by petitioners (R. 49a). On June 29, 1967, the Common Pleas Court confirmed the Board's finding that compensable damages had been sustained and granted a jury trial on the question of amount of damages (R. 50a).

Pursuant to Pennsylvania practice, the Commonwealth of Pennsylvania then appealed to the Supreme Court of Pennsylvania from the action of the Court of Common Pleas (App. pp. 2b-3b).

On May 21, 1968, the Supreme Court of Pennsylvania held that, as a matter of law, no compensable damages had been sustained by petitioners, and directed judgment to be entered for the Commonwealth. The court, completely ignoring the realities of the situation, ruled that petitioners were not entitled to compensation under Pennsylvania's Eminent Domain Code[9] because there was no impairment of ingress or egress to petitioners' property—the property still could be reached via Longshore Street and via the abandoned strip of road, and State Road still could be reached from the property, albeit circuitously rather than directly as before. As for the constitutional issue,[10] the court, noting that petitioners were "insisting that, if compensation is not here granted, appellees will have been unconstitutionally deprived of their property" (App. pp. 7b-8b), held that there was no "taking" in the constitutional sense because petitioners had "no right to the continuation of the existing traffic pattern." (App. p. 8b). The opinion of the Supreme Court of Pennsylvania failed to cite a single decision by this Court, and in a timely petition for reargument filed on May 29, 1968, petitioners again pressed their constitutional claim.[11] Nevertheless, on June 26, 1968, the Supreme Court of Pennsylvania, without opinion, refused reargument.

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9. Section 613 of the **Pennsylvania Eminent Domain Code**, 26 P. S. § 1-613, provides:

> "Whenever a public road, street, or highway is vacated, the affected owners may recover damages for any injuries sustained thereby, even though no land is actually taken."

The Court construed this section as requiring a deprivation of ingress or egress to the property of the "affected owner" (App. pp. 3b-7b).

10. In their brief in the Supreme Court of Pennsylvania, petitioners contended that they had been damaged and that "such damages are compensable under the rulings of this Court prior to the Eminent Domain Code of June 22, 1964, under the specific provisions of the Code, the provisions of the State Constitution and of the 5th and 14th Amendments of the U. S. Constitution." (Brief for Appellee, p. 5)

11. Pp. 13-15 of the certified record from the Supreme Court of Pennsylvania.

REASONS FOR GRANTING THE WRIT.

1. This case presents for decision an increasingly important question of constitutional law which has not heretofore been decided by this Court.

With the advent of the massive interstate highway construction program throughout the United States, the trend toward controlled-access highways and the enormous Federal expenditures involved in these programs,[12] a "twentieth century enigma" has been created—the difficult problem of the right to compensation accruing to owners of abutting commercial property for losses caused by this program. When a change in an existing road or the creation of a new highway deprives a commercial property of traffic flow past its doors—especially in the case of a travel-oriented business—should not the owner of the property be compensated for the resulting depreciation in value of his property? Much has been written in the way of state court decisions and commentary on these questions as well as on the less compelling question of the rights of an abutting property owner when a limited access highway is built and traffic is detoured off existing roads and onto that highway. See KNOWLES, **Loss of Access: A Twentieth Century Enigma,** 6 St. Louis U. L. J. 204 (1960); CROMWELL, **Loss of Access to Highways; Different Approaches to the Problem of Compensation,** 48 Va. L. Rev. 538 (1962).

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12. These programs began with the Federal Aid Highway Act of 1956, 70 Stat. 374, and its companion act, the Highway Revenue Act of 1956.

> "These 1956 highway acts provided a two year authorization for the primary, secondary, and urban federal aid highways (the so-called 'ABC program'); and a thirteen year authorization for the 41,000 mile National System of Interstate and Defense Highways. Authorizations totalled $26,883,000,000. This was to be financed by a comprehensive highway-user excise tax program on a 'pay-as-you-go' basis. This launched the largest peacetime public works program ever conceived by man."

LEVIN, **Problems in Highway Condemnation,** 1959 Wisc. L. Rev. 561.

The instant case presents a critical and recurring problem. Not only has a controlled-access interstate highway been built which will detour traffic from an existing road, but as a result of the construction of the controlled-access highway, the existing road has itself been rerouted and redefined so that the abutting land owners have lost not only the traffic that will be shifted from the existing road to the controlled-access highway, but also the traffic that will remain on the existing road. The direct access between the existing road and the owners' property has been eliminated and it has been determined affirmatively, as a matter of fact, that they have suffered a severe depreciation in the value of their property. As the Supreme Court of California said in **People v. Ricciardi**, 23 Cal. 2d 390, 399, 144 P. 2d 799, 804 (1943):

> "* * * here we do not have a mere re-routing or diversion of traffic from the highway; we have, instead, a substantial change in the highway itself in relation to the defendants' property; i.e., a re-routing of the highway in relation to defendants' property rather than a mere re-routing of traffic in relation to the highway. Defendants' private property rights in and to that highway are to be taken and damaged. * * *"

Under such circumstances, has there been a "taking of property" in a constitutional sense? Certainly the Federal, state and local governmental authorities, as well as the lower courts are in need of guidance from the Court in this area. Compare the results in the **Ricciardi** case (compensation granted) with **Stipe v. United States**, 337 F. 2d 818 (10th Cir. 1964) and the instant case (compensation denied).

2. It has long been recognized that an abutting landowner's right of access to a public street is a "property" right. See, *e.g.*, **Donovan v. Pennsylvania Co.**, 199 U. S. 279, 302 (1905).

The question presented by this and similar cases relates to the scope of this right—whether the right is merely that of a theoretical resident and satisfied if that resident can get in and out of his property, as the court below seems to hold, or whether the right is broader, to be defined in terms of the reality of the situation presented. The decision of the Supreme Court of California in **Ricciardi**, *supra*, illustrates the realistic approach, holding, in a case similar to this, that the problem is not the "* * * mere re-routing or diversion of traffic * * *" but is the "* * * re-routing of the highway in relation to [the] property * * *". In other words, the right of access is to be defined by recognition of the actual nature of the property and its relationship to the particular highway which is being relocated or restructured.

This concept is inherent in the litigation which came before this Court in **Martin v. Creasy**, 360 U. S. 219 (1959). That litigation involved the asserted right of abutting landowners to direct access to a limited-access highway, an issue which this Court refrained from deciding on the basis of the "abstention" doctrine. Involved in that case was the Pennsylvania Limited Access Highways Act which authorized the Pennsylvania Governor and Secretary of Highways to declare any highway, or part thereof, to be a "limited access highway" and further provided that "the owner or owners of private property affected by the construction or designation of a limited access highway * * * shall be entitled only to damages arising from an actual taking of property. The Commonwealth shall not be liable for consequential damages where no property is taken. * * *".

The owners of service stations, restaurants and other commercial property abutting a section of an existing free-access highway between downtown Pittsburgh and the Greater Pittsburgh Airport brought an action in federal

court to restrain the Governor and Secretary of Highways of Pennsylvania from designating that section of road as a "limited access highway", claiming that such action would deprive them of their property without due process because the Act did not provide compensation for their loss of direct access to the highway. The district court initially stayed proceedings to enable the parties to seek a determination of their rights in the Pennsylvania courts. The state courts did not determine whether the owners were entitled to compensation but held that the appropriate procedure would be for the plaintiffs to wait until the Commonwealth took action and then to proceed before viewers in the ordinary course, at which time their rights would be protected. **Creasy v. Lawler**, 8 Pa. D. & C. 2d 535, 538-39 (1956), *aff'd. per curiam* 389 Pa. 635, 133 A. 2d 178 (1957). The district court then proceeded to adjudicate the merits of the controversy. **Creasy v. Stevens**, 160 F. Supp. 404 (W. D. Pa. 1958). Noting that "the right of access has been recognized universally as a property right which cannot be taken or materially interfered with without just compensation" and that "the Pennsylvania courts have also recognized it as a property right", 160 F. Supp. at p. 411,[13] the district court held that the deprivation of the abutting owner's access to the highway would constitute a "taking of property in the constitutional sense." *Id.* at p. 412. It then read the statute as not providing compensation for the abutting owners in the absence of a physical taking of their land. *Id.* at pp. 414-16. "For that reason

13. Citing **Breinig v. Allegheny County**, 332 Pa. 474, 2 A. 2d 842 (1938) and **Lang v. Smith**, 113 Pa. Superior Ct. 559, 173 Atl. 682 (1934). In the latter case the court said (113 Pa. Superior Ct. at p. 563, 173 Atl. at p. 683):

> " 'That a man's right of access to his property is a valuable right which cannot be taken away without just compensation has been repeatedly recognized. * * *' "

the court found the statute repugnant to the Due Process Clause of the Fourteenth Amendment", 360 U. S. at p. 223, and permanently enjoined the Governor and Secretary of Highways from proceeding.

This Court reversed, holding that it was improper for the district court to issue an injunction when there appeared to be a complete and adequate remedy under state law. The Court said (360 U. S. at p. 224):

> "* * * There is no question here of the State's right to create or designate a limited access highway. The only question is the plaintiff's right to compensation. It must be assumed that the courts of Pennsylvania meant what they said in stating that the plaintiffs will be afforded a procedure through which the full measure of their rights under the United States Constitution will be preserved. Assuming, however, that there was a basis to support intervention by a court of equity, the District Court, we think, should nevertheless have declined to adjudicate this controversy."

The Court held that abstention was required not only on the basis of federal-state relationship but also on the basis of specific factors presented by the case, stating (360 U. S. at pp. 224-225):

> "At least one additional reason for abstention in the present case is to be found in the complex and varying effects which the contemplated state action may have upon the different landowners. Some of them may be completely deprived of access; others may have access to existing roads or service roads to be constructed; still others may have access to the highway itself through points of ingress and egress established under the statute. In the state court proceedings the case of each landowner will be considered

separately, with whatever particular problems each case may present.

"There is no reason to suppose that the Commonwealth of Pennsylvania will not accord full constitutional scope to the statutory phrase 'actual taking of property'. If, after all is said and done in the Pennsylvania courts, any of the plaintiffs believe that the Commonwealth has deprived them of their property without due process of law, this Court will be here." (Footnote omitted.)

Martin v. Creasy represents the most recent expression by this Court concerning the right of abutting property owners to access to highways. Unlike **Creasy**, this case squarely presents the question for decision.

3. It has long been established in this Court that the "due process" clause of the Fourteenth Amendment to the Constitution has made applicable to the states the Fifth Amendment's prohibition against "taking" private property for public use without just compensation. See **Chicago B. & Q. R. Co. v. Chicago**, 166 U. S. 226 (1897); **Duncan v. Louisiana**, 391 U. S. 145, 148 (1968). And it is clear that a "taking", in the constitutional sense, is not limited to actual physical possession or seizure of the property. See *e.g.*, **Pennsylvania Coal Co. v. Mahon**, 260 U. S. 393 (1922), holding that Pennsylvania's Kohler Act effected an unconstitutional "taking" even though the Act merely prohibited underground mining which would cause subsidence of surface structures. "The courts have held that the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking. Governmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest

in the subject matter, to amount to a taking." **United States v. General Motors,** 323 U. S. 373, 378 (1945).

In **United States v. Causby,** 328 U. S. 256 (1946), the United States, by flying its military aircraft frequently on low landing and takeoff flights over plaintiff's premises, had so disturbed the peace and quiet of the place as to destroy its use as a commercial chicken farm. Over the Government's objection that any damages to plaintiff's property were merely "consequential" and not compensable, the Court held that the Fifth Amendment required the Government to pay just compensation, stating that the fact that the land might have some value (albeit diminished) after the taking did not make the action of the Government any less of a "taking". *Id.* at pp. 262-63. "The damages", said the Court, "were not merely consequential. They were the product of a direct invasion of [plaintiff's] domain." 328 U. S. at pp. 265-66.

In **Griggs v. Allegheny County,** 369 U. S. 84 (1962), the Court required Allegheny County, Pennsylvania, to pay "just compensation" to a local resident whose home was located below one of the approaches to the County's Greater Pittsburgh Airport, where the noise and vibration from the low altitude flights over plaintiff's home were so unbearable that plaintiff was forced to vacate the premises.

In the **Causby** and **Griggs** cases, this Court evidenced a profound awareness of the plight of the small property owner—an innocent victim of progress, who finds his home or business destroyed by governmental projects, even though there has been no physical seizure of his property. In rendering those judgments, this Court, no doubt, expected the lower courts to follow the approach laid down in these cases.

However, there was another, earlier, line of cases—relied upon heavily by the Government in **Causby**—which had indicated that, **in awarding damages** to an injured

property owner, it was not constitutionally necessary to compensate him for "consequential damages". See, *e.g.*, **United States ex rel. T. V. A. v. Powelson,** 319 U. S. 266, 281-83 (1943), and cases cited therein. But these cases did **not** hold that one whose property was taken could be deprived of **all** compensation for the loss in value to his property simply because one element of damage was expressable in terms of loss of business. All they said was that, in determining the **amount** of compensation to be granted to an injured property owner, the government was not required to include an **additional** amount for such things as injury to a business conducted on property taken by the government [14] or inability to re-establish elsewhere the business that had formerly been conducted on the property taken by the government.[15] In none of these cases was the property owner turned away empty-handed. In none did the Court say that the property owner could not recover for the diminution in value of his property which was caused by the governmental taking. And **Causby** should have made it plain that government must compensate the property owner where it engages in activities which destroy the property's commercial utility. See also **United States v. Kansas City Ins. Co.,** 339 U. S. 799 (1950), where this Court required the Federal Government to compensate the owner of farm land adjacent to a tributary of the Mississippi River for destruction of the agricultural value of the land caused by raising the waters of the river above their ordinary high-water mark, notwithstanding that there was no actual flooding of the land.

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14. **Joslin Co. v. Providence,** 262 U. S. 668, 675 (1923); **Bothwell v. United States,** 254 U. S. 231 (1920).

15. **Mitchell v. United States,** 267 U. S. 341, (1925). See also **United States v. Petty Motor Co.,** 327 U. S. 372, 377-78 (1946). Compare **Kimball Laundry Co. v. United States,** 338 U. S. 1 (1949).

The Supreme Court of Pennsylvania in the instant case ignored the teachings of **Causby** and **Kansas City**, thus blinding itself to the distinction between what is **compensable** and what elements go into the **amount** of compensation. The court simply assumed that a property owner has **no** right to compensation for governmentally-caused loss of value if the diminution can be ascribed to a loss of business.

In view of the elaborate highway construction program in this country, it is of critical importance that this Court now establish guidelines to be applied by the lower courts in dealing with the impact on landowners of highway relocation and construction.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

IN THE
SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

No. 437 JANUARY TERM, 1967

APPEAL FROM THE ORDER OF THE COURT OF COMMON PLEAS OF THE COUNTY OF PHILADELPHIA AT No. 5437 DECEMBER TERM, 1966

IN RE: COMMONWEALTH OF PENNSYLVANIA RELOCATIONS, 6900 STATE ROAD, PHILADELPHIA, PENNSYLVANIA

SUR: PETITION OF JOSEPH J. HESSION AND SOPHIE HESSION, H/W FOR APPOINTMENT OF A BOARD OF VIEWERS

APPEAL OF:
COMMONWEALTH OF PENNSYLVANIA

OPINION OF THE COURT.

ROBERTS, *J.* FILED: May 21, 1968

Appellees are owners of real estate located on the Northwest corner of the intersection of Longshore and State Roads in the City of Philadelphia. Their parcel of land contains a building used partially for residences and partially for the operation of a combined tavern-restaurant. That portion of the real estate not occupied by the structure is used by the patrons of the business as a parking lot. In

1961 the Commonwealth vacated State Road South of Longshore as part of its construction of the Delaware River Expressway. This vacation converted the intersection of Longshore and State from a full cross intersection to a "T" intersection with State Road now ending at Longshore. The new State Road, as now located, is some 300 feet east of the old State Road and traverses an elevated overpass above Longshore Road. Appellees' access to Longshore Road and that portion of old State Road North of Longshore has not been in any way impaired by the Commonwealth's action; new State Road can be reached by traveling a short distance along Longshore. None of their property has been taken.

Pursuant to the Eminent Domain Code, Act of June 22, 1964, P. L. 84, § 101 et seq., 26 P. S. § 1-101 et seq. (Supp. 1967), appellees petitioned for the appointment of viewers to assess damages allegedly sustained as a result of the vacation of State Road South of Longshore and the construction of the new State Road. The board of viewers made an award of $20,000. In accordance with section 516 of the Eminent Domain Code, 26 P. S. § 1-516 (Supp. 1967), the Commonwealth appealed the report of the viewers and, under subsection (4) of that section, objected specifically to the awarding of any damages contending that as a matter of law no compensable damages had been proven. The common pleas court found that appellees had sustained compensable damages and awarded a jury trial to determine the amount. From that order the Commonwealth has appealed.

I.

The opinion of the court below discusses at some length the appealability of its order. Although no motion to quash has been filed, this question merits our attention. Section 523 of the Eminent Domain Code, 26 P. S. § 1-523 (Supp. 1967), provides: "Either party may appeal to the Supreme

or Superior Court as the case may be, from any final order or judgment of the court of common pleas . . . ." The term "final order" is defined in section 517, 26 P. S. § 1-517 (Supp. 1967): "All objections, other than to the amount of the award, raised by the appeal shall be determined by the court preliminarily. The court may confirm, modify, change the report or refer it back to the same or other viewers. A decree confirming, modifying or changing the report shall constitute a final order." Since section 517 further requires that the trial court must make its own determination (unless a jury trial has been demanded) of the amount of damages, the action of the court below in confirming the viewers' decision as to compensability was the most it could do. If the word "confirm" in section 517 is to be given content, then the action of the court below was a confirmation of the viewers' action. Section 517 tells us that such a confirmation is a final order and section 523 allows appeals from all final orders.

In *Dacar Chemical Products Company v. Allegheny County Redevelopment Authority*, 425 Pa. 343, 228 A. 2d 778 (1967) we held that a lower court order which remanded the matter to the viewers was appealable under section 523. It would thus seem mandated that an order which leaves open only the issue of the amount of damages is also appealable. We well realize that the Legislature has created a situation where what would traditionally be an interlocutory order is appealable. However, the language of the Eminent Domain Code requires that we entertain this appeal and we thus turn to the question of compensability.

II.

Appellees contend that their right to compensation can be found in either section 612 or 613 of the Code. Section 612 provides for damages where an abutting owner is in-

jured by a change of grade, an interference with access or a diminution of surface support. Section 613 deals specifically with the vacation of public roads: "Whenever a public road, street, or highway is vacated, the affected owners may recover damages for any injuries sustained thereby, even though no land is actually taken." We are convinced that neither section supports appellees' right to compensation, for we believe that whatever damages are permissible in this litigation under section 612 are also subsumed under the more general language of section 613 and that, under section 613, no compensable damages have been demonstrated.

Although section 613 speaks in terms of damages "for any injuries" sustained by an owner affected by the vacation of a street, the Joint State Government Commission comments appended to section 613 state that the section's purpose is to place the Commonwealth on a parity with all other condemnors and that the section does not broaden the extent of liability for vacation of streets existing before adoption of the Code. See Joint State Government Commission, 1964 Report—Eminent Domain Code at 44-45. The Commissioners give as an example of the extent of liability *In re Melon Street*, 182 Pa. 397, 38 Atl. 482 (1897). *Melon* tells us that the question to be posed is whether the affected owner has suffered an impairment of access to his property. Access, in turn, has been defined by our cases to be the right of ingress and egress. See, e.g., *Breinig v. Allegheny County*, 332 Pa. 474, 2 A. 2d 842 (1938). It is undisputed that in three of the four possible directions of travel from appellees' property access has in no way been impaired for the streets going East, West and North remain as before. Only the Southern route has been changed by the vacation of old State Road and the construction of an elevated highway some 300 feet east. However, appellees can reach the ele-

vated highway by traveling a few blocks to one of the entrances to the expressway. Our cases are legion that, where the result of a condemnor's action is to compel the allegedly affected property owner to travel a short distance farther to reach the system of streets going in a specific direction, this slight inconvenience is not compensable. See, e.g., *Spang & Co. v. Commonwealth,* 281 Pa. 414, 126 Atl. 781 (1924); *Department of Highways Appeal (Mitchell Condemnation Case),* 209 Pa. Superior Ct. 288, 228 A. 2d 53 (1967).

The record before the viewers makes it evident that the damage suffered by appellees is a product of the fact that the elevated highway has transformed what was once a heavily traveled highway (State Road) into a street which carries primarily local traffic only.[1] In essence, appellees base their claim on a belief that the change in the traffic pattern caused by the construction of the expressway and the concomitant decrease in the value of their land as a business property is compensable; they urge this Court to distinguish between properties used for business purposes and those employed as residences and contend that business establishments do have a compensable interest in the traffic pattern existing before a street has been vacated. This argument was considered and expressly rejected in *Wolf v. Department of Highways,* 422 Pa. 34, 220 A. 2d 868 (1966).

The Wolfs owned a gasoline station and motel located on the North side of Route 11, a three lane highway passing

1. Prior to the construction of the elevated highway, State Road was used to avoid heavy traffic on both Torresdale and Frankford Avenues. The testimony of appellees' two real estate appraisers makes it evident that their estimates of the damage suffered is based totally upon loss of traffic. One appraiser characterized the present location of appellees' tavern-restaurant as "inconspicuous" while the other stated that the elevated highway had destroyed all "profitable use" of the premises.

through Cumberland County. The Commonwealth decided to widen Route 11 in the process of which a medial strip was added. This strip in no way affected the access of westbound traffic to the Wolf property but it did require the eastbound lane of travel to progress some distance along Route 11 before entry could be made to the Wolf gas station-motel complex. Recognizing that the Wolfs were in essence claiming that a change in the traffic pattern on Route 11 had decreased the value of their business property, we stated the issue posed as "whether the Commonwealth may regulate the direction of traffic on a highway by the location thereon of medial dividers the result of which location is to so divert traffic that access to the property of an owner of property abutting the highway is available by a circuitous, rather than a direct, route of travel without becoming liable for the effect of such diversion of traffic on the *after* value of the abutting owner's property."[2] (Emphasis in original.) Quoting at length from a Missouri case,[3] we held (id. at 47, 220 A. 2d at 875):

> "Nor does the right of ingress or egress to or from one's property include any right in and to the existing public traffic on the highway, or any right to have such traffic pass by one's abutting property. The reason is that all traffic on public highways is controlled by the police power of the State, and what the police power may give an abutting property owner in the way of traffic on the highway it may take away, and by any such diversion of traffic the State and any of its

2. Although the *Wolf* decision was concerned with the rights of an abutting owner, we believe that the right to compensation of an affected owner under section 613 would be no greater. Furthermore, although Wolf was not decided pursuant to the Eminent Domain Code, section 613 left existing case law untouched.

3. *State v. Meier*, 388 S. W. 2d 855 (Mo. 1965), cert. denied, 382 U. S. 846, 86 S. Ct. 79 (1965).

agencies are not liable for any decrease of property values by reason of such diversion of traffic, because such damages are 'damnum absque injuria', or damage without legal injury.

. . . .

"Respondent, as an abutting property owner on a public highway, does not now *have* and has never had any other property interest in the public highway other than a reasonable right of ingress and egress, as stated. Respondent has never had a property right in the traffic, great or small, on the highway, nor a right to recover damages for a decrease in value of her premises by reason of the diversion of traffic away from her property, nor has she had a property right to have the same amount of traffic pass her property as before or to have it move in the same direction. Respondent's property right of access has never extended further than the right to enter *upon* the highway or to leave it and have reasonable connection to the public road system."[4] (Emphasis in original.)

Although not directly attacking the holding of *Wolf* that loss occasioned by a diversion of traffic is not compensable, appellees impliedly question the wisdom of that decision by insisting that, if compensation is not here granted, appellees will have been unconstitutionally de-

4. Footnote 11 in *Wolf* could be read to indicate that a distinction should be drawn between loss of traffic occasioned by changes in an existing highway and those produced by the erection of a limited access road. To some uncertain extent a few courts may have adopted such an approach. See Cromwell, Loss of Access to Highways: Different Approaches to the Problem of Compensation, 48 Va. L. Rev. 538 (1962). However, we believe that whether the loss of patronage produced by a change in traffic pattern results from either a rerouting of an existing highway, or the erection of a new one, the problem remains the same—is the decrease in land value caused by a change in traffic pattern and the resultant business impairment compensable.

prived of their property. Their argument has two basic branches: (1) when the diminution in value of property reaches a certain magnitude, compensation must be granted and (2) property may be taken in the constitutional sense despite the fact that the owners' title remains undisturbed. Taking the second branch of this argument first, it rests upon the assumption that appellees possessed a right to the traffic pattern existing prior to the vacation of State Road South of Longshore. This must be so for the cases appellees cite, cases such as *Griggs v. Allegheny County,* 402 Pa. 411, 160 A. 2d 123 (1961), rev'd on other grounds, 369 U. S. 84, 82 S. Ct. 531 (1962) (taking of airspace over home), all speak in terms of *rights* of an owner which have been impaired by a condemnor's action. Admittedly, our cases accord a right of access, but this right has not been impaired in the present case. *Wolf,* however, teaches us that no compensable right exists in any given traffic pattern; having no right to the continuation of the existing traffic pattern, appellees may not demand compensation for a change in that pattern.

The first branch of the argument, based upon the following quotation from *Wolf* (supra at 42, 220 A. 2d at 872), falls with the second: "[T]he Commonwealth, acting under the guise of its police power, cannot effect what amounts to a taking of the *rights* of abutting property owners without providing just compensation; . . . 'One fact for consideration in determining such limits (of the police power) is the extent of the diminution (of values incident to the property). When it reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act.'" (Emphasis supplied.) The Commonwealth has taken nothing from appellees (other than their alleged right to a continuation of the traffic pattern) nor has it in any way restricted ap-

pellees' use of their property. Assuming that the after value of their land is $20,000 less than before, to grant compensation for that decrease this Court must accept the proposition that each businessman has a property right in the traffic which flows by his door for it is only when an individual possesses a right that the extent of the diminution of that right becomes relevant. *Wolf* demonstrates that such a right simply does not exist.

The order of the Court of Common Pleas of Philadelphia County is reversed and the record remanded with instructions to enter judgment for the Commonwealth.

Mr. Justice O'Brien files a dissenting opinion.

Mr. Chief Justice Bell took no part in the consideration or decision of this case.

(J76)

IN THE

SUPREME COURT OF PENNSYLVANIA

EASTERN DISTRICT

No. 437 JANUARY TERM, 1967.

APPEAL FROM THE ORDER OF THE COURT OF COMMON PLEAS OF THE COUNTY OF PHILADELPHIA AT No. 5437 DECEMBER TERM, 1966.

IN RE: COMMONWEALTH OF PENNSYLVANIA RELOCATIONS, 6900 STATE ROAD, PHILADELPHIA, PENNSYLVANIA

SUR: PETITION OF JOSEPH J. HESSION AND SOPHIE HESSION, H/W FOR APPOINTMENT OF A BOARD OF VIEWERS

APPEAL OF: COMMONWEALTH OF PENNSYLVANIA

DISSENTING OPINION.

FILED: MAY 21, 1968.

O'BRIEN, *J.*

I cannot agree that, as a matter of law, appellees have suffered no compensable damages under § 613 of the Eminent Domain Code. I fail to see how the majority can conclude from the record that appellees' damage is solely "a product of the fact that the elevated highway has transformed what was once a heavily traveled highway (State Road) into a street which carries primarily local traffic only". While that undoubtedly is the cause of some of

appellees' damages, the record we have from the Board of Viewers hardly reveals that it is the only source of damage. Appellees' expert specifically testified that one of the elements of damage which he considered was "the dead ending of State Road."

I would allow appellees an opportunity to prove at trial what portion of their damages flowed from that vacation of Old State Road. *In re Melon Street,* 182 Pa. 397, 403, 38 Atl. 482 (1897), upon which the drafters of § 613 relied, clearly indicates that the fact that appellees' property can still be reached from three of the four directions is not conclusive: "To draw the line between owners who may and owners who may not recover, at the point where the deprivation of access is total, is to draw it arbitrarily. The abutting owner's special right in a street as a means of access to his property is not limited to the part of the street on which his properly abuts. . . . His right is the right of access in any direction which the street permits. As affecting this right, no distinction can be drawn between a partial and a total deprivation of access; the impairment of the right is a legal injury differing in degree only from its total destruction. . . ." It is entirely possible that appellees at trial could not prove any damages. *Melon* went on to say, at page 405: "To sustain the right of a claimant to compensation because of the vacation of a street it must appear that the loss results from the depreciation in value of his land because of the change in the street, and his loss must be direct and proximate, and so obvious and substantial as to admit of calculation." A slightly more circuitous route to travel does not constitute the requisite loss under the *Melon* standard. *Apple v. City of Philadelphia,* 103 Pa. Superior Ct. 458, 157 Atl. 325 (1931).

Surely the right of access includes access for patrons as well as for the owner. Cf. *Hedrick v. Harrisburg,* 278

Pa. 274, 122 Atl. 281 (1923). Access to an owner of a commercial establishment is worthless if his patrons do not also have access. This is not the same as saying that appellees have a property right in the traffic on the highway, a view rejected in *Wolf v. Department of Highways,* 422 Pa. 34, 220 A. 2d 868 (1966), cited by the majority. I agree with the majority that damages resulting from the diversion of traffic to the elevated highway constitute *damnum absque injuria.* Appellees have no vested right in the traffic going past their premises. Yet they do have a right to allow all those desiring to reach their premises a reasonable opportunity to do so. If appellees can prove that the journey for patrons south of Longshore is considerably more difficult—longer or more complicated—then they should be entitled to recovery under § 613.

I should also like to make one passing remark upon the appealability of the instant order. While I reluctantly concur in the majority's refusal to quash, I would not do so were the language of the statute susceptible of any other meaning. The bifurcated appeal foisted upon the courts can only be termed a judicial Hydra. Would that a Hercules could appear in the legislature to slay this monster.

APPENDIX B.

IN THE COURT OF COMMON PLEAS NO. 2
OF PHILADELPHIA COUNTY

No. 1092 [5437] December Term, 1966

In Re: Commonwealth of Pennsylvania
Relocations, 6900 State Road,
Philadelphia, Pennsylvania

vs.

Sur: Petition of Joseph J. Hession and Sophie Hession,
H/W for Appointment of a Board of Viewers

I.
OPINION

Plaintiffs (condemnees) Sophie and Joseph Hession are the owners of a parcel of real estate, 6900 State Road, Philadelphia, located on the northwest corner of the intersection of Longshore and State Roads. The property is used as a combination bar, taproom and residence. On July 31, 1961, the Commonwealth acting through the Department of Highways and, in accordance with plans for the construction of the Delaware River Expressway, vacated State Road south of Longshore. This vacation changes the intersection from a full cross intersection to a T-intersection with State Road now coming to an end at Longshore Road. Plaintiffs, pursuant to § 502 of the Eminent Domain Code (Act of June 22, 1964, P. L. 34, No. 6, Art. V. § 502

(Special Session) 26 P. S. §1-502) petitioned for the appointment of viewers. Viewers were appointed and they awarded $20,000.00 to Plaintiffs for damages sustained by them as a result of the vacation of State Road. The Commonwealth appealed to this court from the decision of the viewers in accordance with § 515 of the Eminent Domain Code. On appeal, the Commonwealth demanded a jury trial and asked for a preliminary determination by the court of the question of compensability, as provided by §§ 516 and 517 of the Code. (The Commonwealth claims that as a matter of law the damages, if any, sustained by Plaintiffs are not compensable under the Code.) As a preliminary determination we hold that Plaintiffs are entitled to compensation for injuries sustained as a result of the vacation of State Road.

With deference to the Supreme Court, we feel compelled to add the following aside. This opinion is being written at the present time (that is, before there has been a jury trial on the question of the amount of damages) because the Commonwealth has appealed from the preliminary order entered by us holding that Plaintiffs have a cause of action. Whether or not they sustain damages, a jury should decide. The order entered on June 29, 1967, reads as follows:

> As to the board's finding of compensable damages the action of the Board is confirmed. As to the amount of damages and in accord with the Eminent Domain Code (Act of 1964, P. L. 84) (Special Session) 26 P. S. 1-517) a Jury Trial is granted.

(We should have added the words, "if any", after the word damages.)

After careful thought, analysis of the Eminent Domain Code, a reading of the Comments to the Code by the Joint State Government Commission, and a review of the cases of

our Supreme Court, we conclude that the order entered by us on June 29, 1967, is not a final or appealable order and therefore the appeal in the instant case is premature.

Since this issue is certainly not before this court, we refrain from setting forth a detailed argument but rather will only outline our thoughts.

Section 517 of the Code, dealing with appeals to the Common Pleas Court reads in part as follows:

> All objections, other than to the amount of the award, raised by the appeal shall be determined by the court preliminarily. The court may confirm, modify, change the report or refer it back to the same or other viewers. A decree confirming, modifying or changing the report shall constitute a final order.

The amount of damages shall be determined by the court unless a jury trial has been demanded.

Section 523 of the Code reads:

> Either party may appeal to the Supreme or Superior Court as the case may be, from any final order or judgment of the court of common pleas within forty-five days from the entry thereof.

The question as to the appealability of the order is one of construing these sections as they apply to the order. A footnote by Mr. Chief Justice Bell in Manganese Steel Forge Co. v. Commonwealth, 421 Pa. 67, 69, suggests the existence of the problem we discuss here. It is our view that the order in this case while it does use the word "confirmed" does not fall within the meaning of the language of § 517 "A decree confirming, modifying, or changing the report shall constitute a final order." Our order was at best a partial confirmation of the report. A jury trial on the question of the amount of damages is yet to come. Perhaps our order should not have used the word "confirmed". We feel con-

fident that the Legislature did not want to establish a bifurcated appeal procedure whereby a question of law would be appealed with the possibility of a second appeal, after the jury trial.* In fact the Comment of the Joint State Government Commission to § 516 indicates an intention to establish a single procedure to dispose of questions of both law and fact. At best, we find the Code to be ambiguous on the question of the proper time to appeal in this case. Guided by the Comments of the Joint State Government Commission and the decisions of our Supreme Court and the policy set down by the Supreme Court "'to preclude piecemeal determination and the consequent protraction of litigation' . . . and to protect this Court from appeals which the parties might have found unnecessary had they awaited a final order, decree or judgment." Werner v. Commonwealth, 416 Pa. 356, 359, we conclude that the instant appeal was improperly taken.

We now reach the merits of the compensability question.

Plaintiffs claim they are entitled to compensation under both § 612 and § 613 of the Code; Section 612 reads:

Consequential Damages

> All condemnors, including the Commonwealth of Pennsylvania, shall be liable for damages to property abutting the area of an improvement resulting from change of grade of a road or highway, permanent interference with access thereto, or injury to surface support, whether or not any property is taken.

---

* We are aware of the case, Dacar Chemical Products Co. v. Allegheny County Redevelopment Authority, 425 Pa. 343, but feel it does not control the instant case since in Dacar the lower court "changed the order of the board and remanded the matter to the board." 425 Pa. at 348. There the clear language of the Code (§ 517) made the order a final order appealable to the Supreme Court (§ 523). We would distinguish the instant case on the ground that no order affirming the report has been entered and in light of the policy of the Supreme Court, set out below, to avoid unnecessary appeal and protracted litigation.

Prior to the enactment of the Eminent Domain Code of 1964, the Commonwealth was not liable for consequential damages resulting from condemnation although under Article XVI § 8 of the Pennsylvania Constitution municipal corporations had been held liable for consequential damages. See Anderson Appeal, 408 Pa. 179; Pane v. Dept. of Highways, 422 Pa. 489. Section 612 specifically provides for liability of the Commonwealth for consequential damages but only in cases of "change of grade of a road or highway, permanent interference with access thereto, or injury to surface support." Plaintiffs attempt to bring themselves within § 612 by claiming there was an interference with access. Access is not defined by the Code and thus we must look to prior case law to help us to define it. See Pane v. Department of Highways, 422 Pa. 489, 499. See also the Comment of the Joint State Government Commission to Section 612 which indicates that prior law should control. Plaintiffs argue for a broad definition of access encompassing more than simple ingress and egress. Plaintiffs maintain that since State Road was vacated immediately south of the corner on which they are located, access to and from their property has been diminished entirely from that direction. While in the loose sense this fact is true, the cases appear to define access more narrowly, limiting it to ingress to property from the system of roads and egress to the system of roads from the property. See Breinig v. Allegheny County, 332 Pa. 474; Wolf v. Department of Highways, 422 Pa. 34. As long as the owner and his invitees can reasonably get onto the property from the system of public roads and reach the public roads from the property, there is no interference with access. Plaintiffs are not within the provisions of Section 612 of the Code.

Plaintiffs claim they are entitled to compensation under § 613 of the Code which reads as follows:

> Whenever a public road, street, or highway is vacated, the affected owners may recover damages for any injuries sustained thereby, even though no land is actually taken.

There is no question but that a road has been vacated in the instant case. The question to be answered is whether Plaintiffs qualify as affected owners under the language of § 613. Again we rely on prior case law to aid us in defining "affected owners." Two separate issues are presented by the words "affected owners": One, whether the property in question is sufficiently close to the improvement to be held to be a consequence of the improvement, a sort of geographic causation problem, and, two, whether the kind of damages sustained are in law compensable. We have little trouble with the first question. First, we observe the use of the language "affected owners" in § 613 in contrast to the language "property abutting" used in § 612. Contrasting the two, we consider "affected owners" to be the broader term and to include "property abutting." Further we find that Plaintiffs qualify as abutting owners and therefore they certainly come within the definition of "affected owners." See Hedrick v. Harrisburg, 278 Pa. 274. As to compensability, we hold the damages sustained by Plaintiffs, yet to be assessed by the jury in a trial de novo Manganese Steel Forge Co. v. Commonwealth, 421 Pa. 67 are compensable. We rely on In Re Melon Street, 182 Pa. 397, and Hedrick v. Harrisburg, 278 Pa. 274. See also Fecher v. Allegheny County, 313 Pa. 193, 197. Although, in Melon the property in question was left in a cul-de-sac, that is, on a street with no outlet at all at one end, there is broad language in the case which recognizes a *special* right of ingress and egress which is apparently different from the ingress and egress discussed above. In Melon the injury was characterized as different in kind from that suffered by all others who have occasion to use

the street for the purposes of travel only. For the latter the injury is referred to as *damnum absque injuria.* The court said at pages 403 and 404 of 182 Pa.:

> Where the part of a street in front of a property is vacated the owner's right to compensation is conceded, but the right is denied unless there is an actual vacation and closing of the part of the street on which the property abuts. It is evident, however, that without the impairment of the owner's outlet in one direction his property may be rendered comparatively worthless by a change in the physical condition of a street. To draw the line between owners who may and owners who may not recover, at the point where the deprivation of access is total, is to draw it arbitrarily. The abutting owner's special right in a street as a means of access to his property is not limited to the part of the street on which his property abuts. Such a limitation of the right would deny him compensation if all of the street except the part immediately in front of his property were vacated. His right is the right of access in any direction which the street permits. As affecting this right no distinction can be drawn between a partial and a total deprivation of access; the impairment of the right is a legal injury differing in degree only from its total destruction. If the street is vacated on both sides of his property so as to cut him off from other streets, his means of access is as effectually destroyed as if the entire were vacated. If the street is vacated on one side only, and his property is left at the end of a cul-de-sac; if the street is decreased in width so as to be impassable to vehicles; or if one means of access is taken away by the closing of a back street or alley, his injury may be less, but the difference is one of degree only.

> In either case he has sustained a loss by the destruction of an important element in the market value of his property, and he has been injured in the legal sense.

Conceding that the narrow facts of Melon are distinguishable from the facts here because of the cul-de-sac situation in Melon and that the language above is only dictum, we find it to be very persuasive dictum especially in light of Hedrick v. Harrisburg, 278 Pa. The facts in Hedrick are almost identical to the facts here. The only difference seems to be that in Hedrick in addition to the vacation of the street which formed the southern extension of the intersection, there was a narrowing of the westerly street of the intersection thereby cutting off "access" to and from Plaintiffs' property in two directions. The Court in Hedrick held Plaintiffs' damages compensable under a statute not significantly different from § 613 of the Eminent Domain Code. In view of the awarding of compensation in Hedrick, the language in Melon discussing the question of where to draw the line takes on added significance. To allow compensation in the Hedrick case and to deny it here would be one place to draw the line, but to draw it in such a place, that is, the difference between cutting off one street of an intersection and cutting off two, would not make any sense to us nor do we find authority for doing so in the Melon case. In fact our interpretation of Melon leads us to conclude that such a distinction should not be made and that the injuries sustained by Plaintiffs as a result of the vacation of State Road are compensable. In short sum, a jury ought to say whether or not Plaintiffs suffered damage.

/s/ SLOANE, *P. J.*

Dated: December 7, 1967

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IN THE
Supreme Court of the United States

October Term, 1968
No. 760

JOSEPH JOHN HESSION

and

SOPHIE HESSION, His Wife,
Petitioners

v.

COMMONWEALTH OF PENNSYLVANIA

On Petition for Writ of Certiorari to the Supreme Court of Pennsylvania.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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COUNTER-STATEMENT OF THE QUESTION PRESENTED

Where, in the construction of an Interstate highway running southwest to northeast, said Interstate highway being near and to the east of the previously and presently existing intersection of a State highway running north and south with a city street running east and west on the northwest corner of which intersection petitioners' place of business is and was located, it became necessary to change the travel pattern of said intersection and the Commonwealth of Pennsylvania did so by closing off that portion of the State highway running from the intersection to the south and relocating that portion of the State highway extending from said intersection one-fourth mile to the north a distance of 300 feet to the east under and beyond said Interstate highway and thence continuing in a southerly direction, but without closing said portion as it then existed or without denying any previously existing rights of ingress and egress to or from petitioners' place of business, and without payment of any compensation to the petitioners for the said change in the travel pattern, did such change of travel pattern constitute a "taking" under the Pennsylvania Eminent Domain Code of 1964 so as to entitle petitioners to compensation therefor and did the refusal of such compensation to petitioners by the Commonwealth of Pennsylvania violate the Fifth and/or Fourteenth Amendments to the Constitution of the United States in that private property of the petitioners was taken for public use without just compensation and/or in that the petitioners were deprived of property without due process of law?

Answered in the negative by the court below.

COUNTER-STATEMENT OF THE CASE

This case is before Your Honorable Court on a Petition for Writ of Certiorari to the Supreme Court of Pennsylvania, which reversed an order of the Court of Common Pleas of Philadelphia County finding that the petitioners had sustained compensable injuries and awarding a jury trial to determine the amount of such injuries after the Commonwealth had appealed from the award of the Board of Viewers, which awarded twenty thousand ($20,000) dollars as compensation in an eminent domain action instituted by the petitioners.

The petitioners are the owners of a property situated on the northwest corner of State Road and Longshore Avenue in the City of Philadelphia, Philadelphia County, Pennsylvania. State Road runs in a general north-south direction, and Longshore Avenue runs in a general east-west direction. The petitioners' property consists of a combination tavern, restaurant and residence.

On July 31, 1961, the Commonwealth of Pennsylvania, acting through the Department of Highways, condemned certain properties in the City of Philadelphia for the purpose of constructing Legislative Route 1000, Section E2, a portion of an Interstate highway, more commonly known as the Delaware River Expressway. As a result of the construction of the highway, State Road was vacated in a southerly direction, which vacation commenced immediately south of Longshore Avenue, thus converting the previous four-way intersection into a "T" intersection. In addition, State Road has been relocated and now crosses

Longshore Avenue at a point approximately 300 feet to the east of the intersection described above. That portion of old State Road to the north of Longshore Avenue remains open to traffic, is of the same width and grade as that prior to the construction, and, contrary to the petitioners' allegations, has never been abandoned or vacated and remains a part of the State Highway System. The new Interstate highway passes over Longshore Avenue in an elevated manner, and therefore, traffic and the right of passage upon Longshore remain as they were prior to the construction. Longshore Avenue was and continues to be a two-way street and is of the same width and grade as that prior to the construction.

The petitioners' rights of ingress and egress to and from their property have not been impaired in any way whatever, and their access to the general system of streets and roads remains substantially unchanged. No portion whatever of the petitioners' property was condemned by the Commonwealth.

The petitioners' basic contention, precisely stated, is that the vacation of State Road south of Longshore Avenue and the relocation of the portion to the north of Longshore Avenue constitutes a taking of property from them, for which taking they are entitled to compensation.

The Commonwealth's basic position is that since the petitioners' property did not abut either the improved or vacated areas, since they suffered no diminution whatever in their rights of ingress and egress to and from their property and since there was no change of grade or injury to the surface support of any kind, any injury which the petitioners might have suffered does not constitute the taking of a property right so as to entitle them to compensation.

REASONS FOR DENYING WRIT OF CERTIORARI

I.

The Petition for Writ of Certiorari Should Be Denied Because No Substantial Federal Question Exists and Because Prior Decisions of This Court, on Related Questions, Indicate That This Court Will Leave to State Courts the Determination of Such Issues as Have Been Raised by the Petitioners

The respondent, the Commonwealth of Pennsylvania, respectfully submits that the petitioners have failed to raise any substantial federal question which has not, in effect, been heretofore decided by this Court.

In the construction of an interstate highway, the Commonwealth of Pennsylvania, acting through the Department of Highways, found it necessary to vacate the southerly leg of a four-way intersection on the northwest corner of which the petitioners own and operate a combination tavern, restaurant and residence. The three remaining legs of the intersection including the two legs upon which the petitioners' property abuts remain exactly as they were prior to the time the improvement was effected. No portion whatever of the petitioners' property was taken; but, nevertheless, they contend that they have suffered a compensable injury as a result of the above described vacation. This case when stripped of all embellishments, then, is essentially concerned with a property owner's rights in relation to the existing system of

public streets and highways and the existing traffic patterns thereon. Thus, the petitioners are asking Your Honorable Court to determine the rights of abutting property owners, under Pennsylvania law, in the streets on which they abut.

Determination of questions concerning such property rights have traditionally been left to the state courts. *Sauer v. City of New York,* 206 U.S. 536 (1906); *Marchant v. Pennsylvania Railroad Company,* 153 U.S. 380 (1894); *Meyer v. Richmond,* 172 U.S. 82 (1898).

In *Marchant v. Pennsylvania Railroad Company,* supra, a portion of the street on which the plaintiff's property abutted was condemned by the railroad company for construction of an elevated railroad. The pillars supporting the elevated roadway were imbedded in the foundation of the street; however, they were not in front of the plaintiff's property. As in the instant case, no portion of the plaintiff's land was taken or occupied in any way by the railroad. Upon trial, the Court of Common Pleas instructed the jury that the damages suffered were compensable. The Supreme Court of Pennsylvania reversing, ruled that the damages were noncompensable. This Court indicated that it would not interfere with the state court's determination of state law. It was said at page 385:

> "We are not authorized to inquire into the grounds and reasons upon which the Supreme Court of Pennsylvania proceeded in its construction of the statutes and constitution of that State, and if this record presented no other question except errors alleged to have been committed by that Court in its construction of domestic laws, we should be obliged to hold, as has often been held in like cases that we

have no jurisdiction to review the judgment of the State Court, and we should have to dismiss this writ of error for that reason."

In *Sauer v. City of New York*, supra, the city had built a viaduct on 158th Street which had the effect of disturbing the plaintiff's access, light and air. The plaintiff alleged that the statute which authorized the construction of the viaduct was invalid for failure to provide compensation for rights of which the plaintiff claimed to have been deprived. The statute had been upheld by the New York Court of Appeals, and this Court subsequently affirmed that decision. The plaintiff alleged, inter alia, that the decision of the New York Court of Appeals denied him certain rights allegedly secured by the Federal Constitution. This Court said at page 548:

"The same law which declares the easements defines, qualifies and limits them. Surely such questions must be for the final determination of the State Court. It has authority to declare that the abutting landowner has no easement of any kind over the abutting street; or it may determine that he has an absolute or unqualified easement. The right of an owner of land abutting on public highways has been a fruitful source of litigation in the courts of all the states, and the decisions have been conflicting, and often in the same state irreconcilable in principle. The courts have modified or overruled their own decisions, and each state has in the end fixed and limited by legislation or judicial decision, the rights of abutting owners in accordance with its own view of the law and public policy. As has already been pointed out, this court has neither the right nor the duty to reconcile these conflicting decisions, nor to reduce the

law of the various states to a uniform rule which it shall announce and impose."

It seems clear therefore, and rightly so, that this court will not take upon itself the burden of determining routine questions of property law in the several states. This presumes that no constitutional issues of monumental magnitude are presented. However, as indicated by Rule 19(a), Rules of this Court, review on writs of certiorari should not be granted if the federal question presented is neither one of substance nor one decided contrary to applicable decisions of this Court. It is respectfully submitted that the question raised by the petitioner is not only not a federal question of substance, but was decided below squarely in line with the holdings in *Marchant* and *Sawyer,* supra.

There is a great deal of language in the instant petition to the effect that the petitioners have been deprived of a property right without due process of law, contrary to the express provisions of the Fifth and Fourteenth Amendments to the Constitution of the United States. It would appear however, that unless, under the laws of Pennsylvania, the petitioners have acquired such a property right, the taking of such alleged right would not constitute a deprivation of property in violation of the Fifth and Fourteenth Amendments simply because the supposed "property" never existed.

In *Meyer v. Richmond,* 172 U.S. 82 (1898), the City of Richmond had authorized the Richmond and Allegheny Railway Company to construct a portion of its works in such a manner as to obstruct the street upon which the plaintiff's property abutted. The Supreme Court of Appeals of Virginia had denied the plaintiff recovery of any

damages, and this Court affirmed. At page 95 it was said:

> "If under the constitution and laws of Virginia whatever detriment he suffered was *damnum absque injuria* he cannot be said to have been deprived of any property." (Citing *Marchant v. Pennsylvania Railroad,* supra.)

This Court in *Meyer* went on to say, also on page 95:

> "The substantial thing is not that one may be damaged by an obstruction in a street—not that one may be specifically damaged beyond others, but is such damage or deprivation of property within the meaning of the constitutional provision? . . . Decisions in other states we need not resort to or review. Those of this court furnish a sufficient guide."

Immediately following the latter quote, the court proceeded to discuss several previous cases in which it had considered the issue of consequential damages generally. The cases were that of *Northern Transportation Company v. Chicago,* 99 U.S. 635 (1879), *Chicago v. Taylor,* 125 U.S. 161 (1888), and *Gibson v. United States,* 166 U.S. 269 (1897). In the first two cases the injuries for which compensation was sought were the result of consequential damages incurred during construction, but which ceased when the construction was completed. While the respondent well recognizes a difference in quality and degree between damages suffered for a temporary period and damages resulting from a permanent change in the street system surrounding a property owner's land, it should be noted that this Court made it clear in both of these cases that the question of conpensability of such damages was to be determined by the state courts and the disallowa ıce

of such compensation by the state tribunals did not constitute any affront to basic property rights protected by the Federal Constitution. In *Northern Transportation Company v. Chicago,* supra, the court said at page 642:

> ". . . acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision. They do not entitle the owner of such property to compensation from the State or its agents, or give him any right of action."

In the *Gibson* case, supra, the damage to the claimant's property was permanent, however, and resulted from the construction of a dike by the U. S. Army Corps of Engineers which impaired a riparian property owner's access to the navigable channel of the Ohio River. It would appear that a valid analogy might be drawn between the *Gibson* case and the instant case. Both cases deal primarily with impairment of access to public ways and in neither case was any portion of the claimant's property taken. In holding that the damage suffered by Mrs. Gibson was damnum absque injuria, this Court said at page 275:

> "The 5th Amendment to the Constitution of the United States provides that private property shall not 'be taken for public use without just compensation'. Here, however, the damage of which Mrs. Gibson complained was not the result of the taking of any part of her property, whether upland or submerged, or a direct invasion thereof, but the incidental consequence of the lawful and proper exercise of a governmental power."

It would appear, then, that the refusal of the Supreme Court of Pennsylvania to grant compensation for consequential injuries is squarely in accord with those decisions of this court dealing with such injuries.

Nor can the petitioners complain that they have been deprived of "due process of law". It should be noted that the critical factor in determining whether due process has been accorded a complainant is whether a fair trial or hearing, governed by procedures fair, reasonable and adequate under the circumstances are available to the complainant. *Pearson v. Yewdall,* 95 U.S. 294 (1877), *Remington Paper Co. v. Watson,* 173 U.S. 443 (1899). In this case there is no doubt but that such hearings and procedures were not only available but were utilized by the petitioners as they have been before the Board of Viewers, the Court of Common Pleas and the Supreme Court of Pennsylvania. The only matter about which the petitioners can truly complain is that the law of Pennsylvania is unsatisfactory as applied to them.

Also, it should be noted that there is nothing unique about the damages allegedly suffered by petitioners. The statute and decisions of which they complain probably affect all members of the public at one time or another. The comment of this Court in *Marchant,* supra, at page 386 appears applicable to this situation:

> "The plaintiff below had the benefit of a full and fair trial in the several courts of her own State, whose jurisdiction was invoked by herself. In those courts her rights were measured, not by laws made to affect her individually, but by general provisions of law applicable to all those in like conditions."

On this question the Court also said the following at pages 385-386:

> "It is sufficient for us in the present case to say that even if the plaintiff could be regarded as having been deprived of her property, the proceedings that so resulted were in 'due process of law'."

In summary, it is respectfully submitted that no substantial federal question has been raised by petitioners and that the questions raised have been decided in accordance with applicable decisions of Your Honorable Court, and the Petition for Writ of Certiorari should therefore be denied.

II.

The Petition for Writ of Certiorari Should Be Denied Because Under the Law of Pennsylvania, the Petitioners Have Suffered No Deprivation of Access to the General System of Streets and Highways so as To Entitle Them To Compensation

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As set forth in the preceding section of this brief, the Commonwealth of Pennsylvania, in the course of the construction of the Delaware River Expressway, converted the intersection of State Road and Longshore Avenue from a four-way intersection to a "T" intersection and relocated State Road to a position approximately 300 feet to the east of its previous location. The petitioners contend, inter alia, that, as a result of this vacation and relocation, they have suffered a compensable deprivation of their rights of access to the general system of streets and roads.

It is the Commonwealth's position that the petitioners have been deprived of no compensable rights of access whatever and that, at the very most, the petitioners have suffered a mere inconvenience common to all other property owners in the general area.

On page 4 of the Petition for Writ of Certiorari, the petitioners state that the quarter-mile section of old State Road to the north of Longshore Avenue has been abandoned and that through traffic upon old State Road has been completely curtailed. The petitioners cite page 5a of the record as authority for this statement. It should be noted at this point that this reference is to the original

Petition for Appointment of Viewers, and the mere allegation contained therein that this section of old State Road has been abandoned is in no manner supported by any testimony whatever contained in the record. The quarter-mile section of old State Road immediately north of Longshore Avenue is, in fact, open to traffic, is of the same grade, width and dimensions as prior to the construction project, has been neither abandoned nor vacated, and therefore remains a part of the State Highway system. The condition of old State Road is well shown by Photograph No. 2, Appendix C, page 22b of the Petition for Writ of Certiorari.

In addition, even if the Commonwealth should decide, at some time in the future, to abandon this quarter-mile portion of old State Road, it would still remain open to traffic and would be maintained by the City of Philadelphia in accordance with the Act of 1945, June 1, P. L. 1242, Art. II, Section 214, 36 P.S. Section 670-214.

It is respectfully submitted that, under the law of Pennsylvania, the word "access", when used in connection with the rights of an abutting owner, means ingress to and egress from the subject property and does not refer to the manner in which a property owner travels from his property to any other place in the region in which he resides. In *Breinig v. Allegheny County,* 332 Pa. 474, 2 A. 2d 842 (1938), the property owner had obtained a permit to install a driveway, including curbing, but in the course of the construction, the county revoked the permit and restored the curb.' The Supreme Court of Pennsylvania affirmed the granting of an injunction restoring access. In utilizing the word "access", that Court said as follows, at page 480:

"Where the land is taken or purchased for highways, the abutting owner retains as an incident to ownership of the remainder of his land, the right of access or of ingress and egress. This right cannot be taken from him unless compensation is made therefor under the law. It is a property right, protected by the Constitution. The right of access, in addition to the rights of the owner in the fee described above, differs from the right of passage by the public generally."

Breinig, supra, and specifically the above language, was cited with approval in the most recent and perhaps the most pertinent case, *Wolf vs. Department of Highways,* 422 Pa. 34, 220 A. 2d 868 (1966). In that case, the Supreme Court of Pennsylvania said at page 39:

"Such right of access does not entitle the abutting owner to access at *all* points along the highway; it does entitle him to access, by reasonable and convenient means, *to his property from the highway and from his property to the highway. . . .*" (Emphasis supplied.)

In *Wolf,* supra, the Pennsylvania Supreme Court also cited with approval a Missouri case, *State of Missouri v. Meier,* 388 S.W. 2d 855 (Mo. 1965), certiorari denied, 382 U.S. 846 (1965). It was said as follows in *Wolf,* supra, at page 46:

". . ., the Supreme Court of Missouri has well evaluated the prospective rights of an abutting owner and the State: 'an abutting owner's property right to "access" is better described as the right of ingress and egress to and from his property and the abutting public highway. The right also includes the further

right to connect with or reach the system of public highways, which right is also subject to reasonable restriction under the police power of the State in protecting the public and facilitating traffic. The right does not include the right to travel in any particular direction from one's property or upon any particular part of the public highway right-of-way because, after one is upon the highway he has the same right as all other travelers and the right of travel is a public right and controlled by the police power of the State.' "

It is clear then that, under the law of Pennsylvania as evidenced by the above cases, an abutting landowner's rights of access to a public street are indeed a property right. However, it is clear also that this right of access is limited to the ability of the landowner to gain access to and from the streets and highways upon which his property abuts and does not include the right to have direct access to all portions of the general system of highways.

Donovan v. Pennsylvania Co., 199 U.S. 279 (1905), cited on page 9 of the Petition for Writ of Certiorari is not at all inconsistent with this definition of access. In that case a property owner (the Pennsylvania Co.) was prevented from reaching the streets upon which its passenger station abutted by the actions of various independent cabbies and hack drivers. In defining an abutting landowner's right of access to a public street as a property right, then, this Court held nothing more than that the right consisted of the right of the landowner to leave his property via the abutting streets, free from interference by the offending cabbies. This is essentially the extent of the right of access accorded abutting property owners in Pennsylvania.

The holdings in the *Creasy* cases cited on pages 9 and 10 of the Petition for Writ of Certiorari appear also to be consistent with the present law in Pennsylvania. (*Martin v. Creasy,* 360 U.S. 219 (1959), *Creasy v. Lawler,* 8 Pa. D. & C. 2d 535 (1956) and *Creasy v. Stevens,* 160 F. Supp. 404 (W.D. Pa. 1958). In those cases the owners of businesses situated along an existing free access highway brought an action in federal court to restrain the Governor and the Secretary of Highways of Pennsylvania from designating that section of road as a "limited access highway". The federal court issued an injunction; and this Court reversed, holding nothing more than that it was improper for the district court to issue the injunction when there appeared to be a complete and adequate remedy under the law of Pennsylvania. All of these cases involved the situation where the abutting property owners were prevented from reaching the street upon which their properties abutted, unlike the situation in the instant case where the petitioners' ability to reach the abutting streets remains unimpaired.

The petitioners cite also *People v. Ricciardi,* 23 Cal. 2d 390, 144 P. 2d 799 (1943). In that case there was indeed "a substantial change in the highway itself" in that, as in the *Creasy* cases, supra, the portions of highway upon which the property owner's land abutted were themselves physically altered in the course of the construction project, thereby substantially impairing the owner's ability to enter and leave his property. In addition, in *Ricciardi,* supra, a portion of the owner's property was taken, unlike the situation in the instant case.

It is clear from the record here that the petitioners' property has sustained no change in the rights of access as defined by the above cases. The petitioners' property

does not directly abut upon any improved area and no change of grade or injury to surface support has occurred on either of the two streets upon which their property does abut.

The petitioners can still exit from their property onto old State Road and turn right, or southwardly, to Longshore Avenue. Upon reaching Longshore, they may proceed in either direction, eastwardly or westwardly, without interruption. It is also possible for the petitioners to exit from their property and turn left, or northwardly onto old State Road and travel in the same direction and upon the same system of public streets as was available prior to the construction.

The only change which the construction has effected in the general area of the subject property is that, at a point commencing on the southerly side of Longshore Avenue, State Road has been vacated in a southerly direction and has been relocated to a position approximately 300 feet to the east. Thus, the petitioners are not denied the right to travel in a southerly direction, since, by traversing Longshore Avenue, in an easterly direction, for several hundred feet, they may reach the relocated State Road and thereon may proceed in a southerly direction without interruption. Briefly stated then, the petitioners' right of travel remains completely unimpaired in three directions, and in the fourth it involves a relatively insignificant detour of 300 feet.

With regard to the slight circuity of travel involved in traveling in a southerly direction from the petitioners' property, the Commonwealth respectfully submits, that under the law of Pennsylvania, this does not entitle a property owner to compensation. This the Superior Court of

Pennsylvania recently decided *In Re: Appropriation of Land of Robert E. Mitchell et ux.*, 209 Pa. Superior Ct. 288, 228 A. 2d 53 (1966). In *Mitchell* that Court, in considering the situation where a property owner was forced, as a result of highway construction, to take a more circuitous route over township roads in order to travel to the nearest town, said at page 294:

> "Every slight inconvenience cannot be compensated in damages. The inconvenience here suffered was the same in kind and no greater in degree than could be claimed by all persons in that vicinity . . . The underlying principle is, damages will not be allowed where the effect of the disturbance to the highway is merely to cause the owner to travel a short distance further in order to reach the system of streets in that direction." (Citing *Spang & Co. v. Commonwealth*, 281 Pa. 414, 418, 126 A. 781 (1924)).

The respondent respectfully submits that the Supreme Court of Pennsylvania correctly decided that, under the law of Pennsylvania the petitioners were not entitled to compensation, and for this reason the Commonwealth of Pennsylvania respectfully requests that the Petition for Writ of Certiorari be denied.

III.

The Petition for Writ of Certiorari Should Be Denied Because, Under the Law of Pennsylvania, the Diversion of Traffic and the Subsequent Injury to a Business Do Not Result in the Taking of a Property Right so as To Entitle An Abutting Property Owner to Compensation

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Inextricably associated with the petitioners' claim that they have been deprived of a compensable right of access, is the claim that they are entitled to compensation for the diminution in the value of their business as a result of the diversion of traffic caused by the improvement project.

It is a well settled principle in this Court that damage to a business is not compensable. *Joslin Co. v. Providence,* 262 U.S. 668 (1923) and *Mitchell v. United States,* 267 U.S. 341 (1925). In noting these very cases in connection with the case of *United States ex rel. T.V.A. v. Powelson,* 319 U.S. 266 (1943), the petitioners argue that in none of these cases was the property owner deprived of *all* compensation for the loss in value to his property simply because one element of damage was expressable in terms of loss of business. It is difficult to see how this reasoning defeats the proposition that the damages to a business are generally noncompensable and specifically so in this instance, especially since virtually all the expert valuation testimony in the record of this case indicates that the injury to petitioners' business as a result of the diversion of traffic is the *only* real injury which the petitioners have incurred. Also, it should be noted that the

only reason all compensation was not denied in the *Joslin, Mitchell* and *Powelson* cases, supra, is that there were additional, legally recognized, compensable elements of damage present in each case.

In addition, the refusal of compensation for business damage suffered as a result of diversion of traffic appears to be the generally prevailing view among the various states. The Supreme Court of California, speaking in *People v. Ricciardi,* supra, said on page 399, immediately preceding that portion of the opinion quoted on page 9 of the Petition for Writ of Certiorari.

> "If traffic normally flowing over that highway were re-routed or if another highway were constructed which resulted in a substantial amount of traffic being diverted from that through highway the value of their property might thereby be diminished, but in such event defendants would have no right to compensation by reason of such re-routing or diversion of traffic. The re-routing or diversion of traffic in such a case would be a mere police power regulation, or the incidental result of a lawful act, and not the taking or damaging of a property right."

In Pennsylvania, the law appears to be equally well settled that a diminution in the value of a business as the result of a diversion of traffic is a noncompensable element of damage. In the *Wolf* case, supra, the Supreme Court of Pennsylvania quoted at length from the case of *Missouri v. Meier,* at page 47:

> " 'Nor does the right of ingress or egress to or from one's property include any right in and to the existing public traffic on the highway, or any right to have such traffic pass by one's abutting property.

The reason is that all traffic on public highways is controlled by the police power of the State, and what the police power may give an abutting property owner in the way of traffic on the highway it may take away, and by any such diversion of traffic the State and any of its agencies are not liable for any decrease of property values by reason of such diversion of traffic, because such damages are 'damnum absque injuria', or damage without legal injury.

* * * * * * * *

"Respondent, as an abutting property owner on a public highway, does not now have any and has never had any other property interest in the public highway other than a reasonable right of ingress and egress, as stated. Respondent has never had a property right in the traffic, great or small, on the highway, nor a right to recover damages for a decrease in value of her premises by reason of the diversion of traffic away from her property, nor has she had a property right to have the same amount of traffic pass her property as before or to have it move in the same direction. Respondent's property right of access has never extended further than the right to enter upon the highway or to leave it and have reasonable connection to the public road system. Once upon the highway, the police power of the State controlled and respondent and her invitees were subject to the 'Rules of the Road' as established . . . under the police power of the State . . .'' '' (at page 857)

The leading case in Pennsylvania dealing with diversion of traffic, however, is that of *Johnson's Petition,* 344 Pa. 5, 23 A. 2d 880 (1942), a case remarkably similar to the present one. In that case, the state highway upon

which the property owner's land abutted was relocated in such a manner that the new road passed to the rear of the subject property instead of by the front of the property as it had previously. The old state highway reverted to the township, however, and remained open to public travel. Consequently, the number of the landowner's patrons was materially reduced as a result of the diversion of traffic from the old to the new route. As in the instant case, the expert witness took into account the diminution in the value of the landowner's tavern business as a result of the diversion of traffic and allotted a considerable portion of the damages thereto. Unlike the instant case, however, a portion of the landowner's property was physically taken. The Supreme Court of Pennsylvania said at page 10:

> "It is for the loss in market value, *due to the taking,* that the Commonwealth is responsible. The owner's property rights were not invaded nor was there any legal injury to it by reason of the mere fact that the Commonwealth provided an additional road with the result that the public had the choice of two routes and the travelers might choose the new route in preference to the old one. The state owed no duty to the appellee to see that travel continued to pass by his door. The current of public travel is bound to shift as affected by innumerable conditions. 'Benefits which come and go with changing currents of public travel are not matters in which any individual has any vested right against the judgment of those public officials whose duty it is to build and maintain these highways': Nelson v. State Highway Board, 110 Vt. 44, 1 A. 2d 689, 693, 118 A.L.R. 915. (Also see note attached, p. 921.)

> "The owner of land abutting on a highway has no property or other vested right in the continuance of a certain amount of traffic over that highway so long as he is not deprived of ingress and egress. Here the diversion of traffic was not due to the taking of appellee's land, but was occasioned by the laying out of a new road which attracted the public. . . . In any event, the consequences here were too far removed from the taking to form the basis of a claim of legal injury. . . ."

(See also *Heil v. Allegheny County,* 330 Pa. 449, 456, 199 A. 341 (1938)).

The respondent respectfully submits that, under the law of Pennsylvania, as set forth above, the petitioners are not entitled to compensation for diminution in the value of their business as the result of the diversion of traffic caused by the above described construction project.

The petitioners cite *Pennsylvania Coal Company v. Mahon,* 260 U.S. 393 (1922) and *United States v. General Motors Company,* 303 U.S. 373 (1945), in support of their contention that a "taking" in the constitutional sense is not limited to an actual physical seizure of the property. The *Mahon* case, supra, involved the validity of a Pennsylvania statute which forbade the mining of anthracite coal in such a manner or to cause a subsidence of, among other things, structures used for human habitation. The Supreme Court of Pennsylvania held that, under the facts of the case, the statute was constitutional. This Court reversed, holding that there are situations in which the exercise of the police power goes so far as to amount to a taking under the power of eminent domain, for which compensation must be made.

The *General Motors* case, supra, involved the appropriation for temporary occupancy by the United States, of a portion of a building previously occupied by the General Motors Corporation under a long term lease. This Court held that governmental action short of actual acquisition of title or occupancy could, if its effects were such as to deprive the owner of all or most of his interest in the subject matter, amount to a compensable taking.

Respondent has no quarrel whatever with the holdings of these two cases. The Commonwealth of Pennsylvania fully agrees that an actual physical seizure is not necessary for there to be a "taking" in the constitutional sense. However, the respondent respectfully submits that the "taking" must involve, at the very least, the appropriation of a tangible, legally recognized right. It should be noted that in both the *Mahon* and *General Motors* cases, supra, there was just such an appropriation of an actual, legally defined right. In *Mahon,* the right taken was the right of an owner to mine his coal, a right incident to ownership of the coal itself, i.e., the right of a property owner to dispose of his property if he so chooses. In *General Motors,* the right taken was the specific, legally recognized, leasehold right of occupancy. This Court said in *General Motors,* supra, at page 380:

> "Even where state constitutions command that compensation be made for property 'taken or damaged' for public use, as many do, it has generally been held that that which is taken or damaged is the group of rights which the so-called owner exercises in his dominion of the physical thing, and that damage to these rights of ownership does not include losses to his business or other consequential damage."

As noted previously, the petitioners have not been deprived of any such tangible, legally recognized right incident to the ownership of their property.

The case of *United States v. Kansas City Life Insurance Co.*, 339 U.S. 799 (1950), cited by petitioners in support of their contention that business damages are compensable, appears also to have no meaningful application in the instant case. In that case, the Federal Government raised the level of the creek upon which the property owner's land abutted to such a degree that, while there was no actual flooding of the land, its value was almost completely destroyed in that its subsurface water could no longer drain off into the creek. This Court said at pages 802-803:

> "The damage was caused by the underflowing of the land. The subsurface erosion was substantially as destructive as if the land had been submerged."

Even though there was no actual surface flooding then, there was, in effect, a subsurface flooding, a subsurface invasion of the subject property which destroyed its value. As has been shown in the instant case, there has been no invasion whatever of the petitioners' land either above or below the ground level and the property remains exactly as it was prior to the vacation and relocation project described above.

In connection with their argument, the petitioners also cite *United States v. Causby*, 328 U.S. 256 (1946) and *Griggs v. Allegheny County*, 369 U.S. 84 (1962). Both cases held, in effect, that the utilization of airspace above a property by airplanes flying so low, as in taking off or landing, as to substantially interfere with the landowners' use and enjoyment of his property constitutes a compen-

sable taking of a property right. Again, respondent has no quarrel with the holdings of these two cases, however, it is respectfully submitted that they have no application here. There is no doubt but that there are property rights, the taking of which is compensable, and that such rights may be other than the ownership of the land itself. Still, the conclusion is inescapable that petitioners have not lost any of these basic rights, as defined by the law of Pennsylvania, so as to entitle them to compensation.

CONCLUSION

The respondent, the Commonwealth of Pennsylvania, respectfully submits that the petitioners have failed to raise any substantive federal question or any question not previously considered by Your Honorable Court. The respondent further respectfully submits that the decision of the Supreme Court of Pennsylvania, as governed by the law of Pennsylvania, is in accordance with the applicable prior decisions of the Court and is in no manner whatever repugnant to the provisions of the Constitution of the United States.

The respondent therefore respectfully urges that Your Honorable Court deny the Petition for Writ of Certiorari to the Supreme Court of Pennsylvania.

Respectfully submitted,
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